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In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL BEDDING MANUFACTURING ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-22) is reported at 550 F. 2d 1380. The opinions of the district court (Pet. App. A-23 to A-36) are not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-37) was entered on April 22, 1977. The petition for a writ of certiorari was filed on July 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether poultry processors that neither own nor operate farms but that contract with others to feed and

raise chickens are "engaged in the production of agricultural products as farmers" within the meaning of the Capper-Volstead Act, 7 U.S.C. 291.

STATUTES INVOLVED

The pertinent portion of Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, is set forth at Pet. 2. The Capper-Volstead Act, 42 Stat. 388, 7 U.S.C. 291-292, is set forth at Pet. App. A-5 to A-7 n. 5.

STATEMENT

Petitioner is a marketing cooperative composed primarily of vertically integrated broiler producers known as "integrators." Most integrators own breeding flocks of chickens that lay eggs, which hatch into chicks. The integrators take the chicks to independent contractors or "growers" that tend them during the "grow-out phase" while the birds become large enough to eat. The growers own the land and buildings in which the grow-out process occurs, and they supply the necessary labor. The integrators supply and own the birds, and they also supply the necessary feed and veterinary services. At the end of a prescribed period the integrators retrieve the chicks and prepare them for sale. See generally Pet. App. A-4 to A-5.

The members of the cooperative routinely exchange price information and attempt, in other ways, to ensure a market at stable prices for their products. On April 16, 1973, the United States commenced this civil antitrust action against petitioner, contending that it represented a combination of its members in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Petitioner contended that its activities were lawful because it is an agricultural cooperative that is largely exempt from the antitrust laws by virtue of the Capper-Volstead Act, 7 U.S.C. 291-292.

The Capper-Volstead Act exemption applies to "[p]ersons engaged in the production of agricultural products as farmers * * *."[1] Petitioner contended that the integrators produce the broilers from egg to market and consequently are "farmers." The district court agreed. The court reasoned that the integrators bear most of the economic risk in the process of producing broiler chickens for market and that the integrators consequently should be treated as the "farmers."[2]

The court of appeals reversed (Pet. App. A-1 to A-22). The court concluded that the Capper-Volstead Act's reference to "farmers" included a smaller group than "all

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[1]The exemption is not total. See *Maryland and Virginia Milk Producers Association, Inc.* v. *United States*, 362 U.S. 458, 465-467; *United States* v. *Borden Co.*, 308 U.S. 188, 204-206. In its amended complaint (see note 2, *infra*), the United States does not allege that petitioner engaged in any practices that would not be exempt if the integrators are "farmers," however, so that the reach of the antitrust laws to Capper-Volstead "farmers" therefore is not in issue here.

The Capper-Volstead issue also controls petitioner's claim to antitrust exemption under Section 6 of the Clayton Act, 38 Stat. 731, 15 U.S.C. 17, since that statute provides protection coextensive with Capper-Volstead immunity. *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U.S. 384, 391.

[2]The district court initially granted petitioner's motion for partial summary judgment; after the United States filed an amended complaint eliminating additional issues, the court entered a final judgment to permit appellate review. The court did not reach petitioner's argument that Section 5 of the Cooperative Marketing Act of 1926, 44 Stat. 803, 7 U.S.C. 455, furnished a defense to the antitrust charges.

The parties have stipulated (R. 567, 574) that after resolution of the Capper-Volstead issues a new complaint may be filed to revive any other issues that remain open. ("R." refers to the joint appendix in the court of appeals. Petitioner has lodged a copy of this appendix with this Court.)

persons engaged in the production of agricultural products"; it held that petitioner's members, although engaged in the production of agricultural products, are not "farmers."

The court first took an ordinary-language approach to the statute and explained that "[w]hatever else farming may mean, an irreducible minimum must be either husbandry of animals or crops or farm ownership" (Pet. App. A-13). The integrators do not own the places where the broilers are grown and do not tend them during the grow-out phase. The court of appeals therefore turned to the legislative history of the Capper-Volstead Act to determine whether Congress intended to exempt from the antitrust laws a group broader than those ordinarily understood to be "farmers."

The court concluded that the Capper-Volstead Act had been designed to grant special advantages to small farmers in order to improve their position vis-a-vis middlemen. The court observed that Congress had defeated an amendment that would have extended the Act's protection to integrated processors (like sugar processors that turn agricultural products into refined sugar) that entered into pre-planting contracts with growers (Pet. App. A-17 to A-18). Since petitioner's members fall closer to the sugar processors that are outside the Act than to the ordinary understanding of "farmers," the court concluded, they could not be the beneficiaries of the Act.

ARGUMENT

The decision of the court of appeals is one of first impression. There is no conflict among the circuits, and the court of appeals has tracked this Court's analogous decision that drivers employed by integrated poultry producers are not farmers for purposes of exemption from the

National Labor Relations Act. *Bayside Enterprises, Inc.* v. *National Labor Relations Board*, 429 U.S. 298.

Petitioner's major argument is that broiler production and marketing is a major industry that will be affected throughout the nation by this decision, since it applies to a nationwide cooperative of integrators. Review of the present case is necessary, petitioner argues, because there can never be a conflict among the circuits with respect to broiler integrators (Pet. 9-10, 13).[3]

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[3]Petitioner also seems to argue (Pet. 6-7) that the Court should grant review because it was misled by the Department of Justice into believing that its operations would be lawful, yet now finds itself facing substantial monetary liability if the decision below is allowed to stand. This argument is itself misleading.

In 1969 the Department issued a business review letter to the National Egg Co., expressing an intent not to institute a criminal prosecution of a cooperative that planned to admit a corporation that contracted with farmers for the care of laying hens and the production of eggs. The letter was issued pursuant to a procedure for the review of particular proposed actions on a case-by-case basis. The Department expressly reserves the right to change its mind and institute a prosecution if the public interest should so require (28 C.F.R. 50.6).

Petitioner was formed in 1970. It did not seek approval pursuant to the business review procedure. On November 17, 1971, the Department issued a business review letter to Holly Farms Poultry, Inc., concerning Holly's proposal to join petitioner. The business review letter stated that integrators that contracted out for the growing of broilers were not themselves farmers within the meaning of the Capper-Volstead Act, and in a simultaneous press release the Department took the position that agricultural cooperatives might forfeit their limited antitrust exemption if they admitted integrators.

Although petitioner was thus on formal notice of the Department's legal position, it continued to operate as before. The Department brought suit in 1973. Since the Department seeks only an injunction against petitioner's marketing practices, petitioner is not entitled to defend on the ground that it was "mislead." Whether such a defense would be valid in a treble damages action is a question that need not be faced in this case. *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 592-595.

Petitioner's argument is unpersuasive. Whenever a particular combination in restraint of trade is alleged to violate the antitrust laws, there cannot be a conflict among the circuits with respect to that particular combination; *res judicata* ensures that there will be only one decision, unless private cases should reach other courts of appeals. As petitioner concedes (Pet. 13), the same legal issue easily could arise with respect to other agricultural products (or even with respect to other poultry marketing associations), and such suits may be brought in other courts. The claim, therefore, is not a sufficient reason to grant review in the present case.[4]

1. The court of appeals correctly held that the language and legislative history of the Capper-Volstead Act establish that it provides only a narrow antitrust exemption limited to persons who own or operate "farms." The statute's language was carefully chosen to make the exemption narrower than one that would have covered all "agricultural producers"; the language Congress used excludes all but "actual farmers" (H.R. Rep. No. 24, 67th Cong., 1st Sess. 1 (1921)) from the Act's coverage.

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[4]Petitioner's assertion (Pet. 10-13) that the decision of the court of appeals portends immediate and far-reaching consequences in the poultry industry is speculative. The decision permits integrators to maintain their operating structure so long as they avoid fixing prices or otherwise violating the antitrust laws. Whether integrators now will enter the grow-out phase of broiler production, as petitioner contends (Pet. 11-12), will turn on countless legal, economic and other factors in addition to the interpretation of the Capper-Volstead Act. Integrators might hesitate to become farmers because of the capital investment required (R. 532) and the lower productivity of farm employees as opposed to independent farmers (Broiler Business, October 1976, pp. 10-11). Petitioner also retains the option of seeking relief from Congress if it believes that integrated agricultural producers should be immune from antitrust liability.

The Act does not reach persons who do not own or operate "farms" in the traditional sense. Congress defeated a proposed amendment that would have extended the antitrust exemption to integrated producers that, like petitioner's members, prepare agricultural products for market but do not own or operate the farms on which the products are raised. See Pet. App. A-17 to A-18; *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U.S. 384, 392 n. 9.

Petitioner contends that this represents a romantic view of farming in a day when most agricultural operations are carried on by large integrated producers (Pet. 10-11). Perhaps that is so. But we believe that there is overwhelming evidence that Congress passed the Capper-Volstead Act with just such a view, and we submit that its decision to limit the scope of the antitrust exemption to ordinary "farmers" should be respected.[5]

Congress artfully crafted the Capper-Volstead Act to advance two overriding goals. The first was to increase farmers' income at the expense of middlemen but not consumers.[6] This could be accomplished, in the judgment of Congress, by providing antitrust immunity to farmers collectively engaged in processing or marketing agricultural produce, while denying such immunity to persons who might injure consumers or competitors.[7] Second,

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[5]See, *e.g.*, Landes and Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & Econ. 875, 877, 883, 894 (1975).

[6]*Case-Swayne Co.* v. *Sunkist Growers, Inc.*, *supra*, 389 U.S. at 393; H.R. Rep. No. 24, 67th Cong., 1st Sess. 2 (1921); 62 Cong. Rec. 2060 (1922) (remarks of Senator Capper); *id.* at 2274-2275 (remarks of Senators Kellogg and Norris); *id.* at 2275 (defeat of the Phipps amendment).

[7]*Maryland and Virginia Milk Producers Association, Inc.*, *supra*, 362 U.S. at 466-467.

Congress sought to encourage farmers to remain on their land and thus to preserve traditional farm life.[8] The traditional farmer was viewed by many as the backbone of the Nation's economic and social individualism, and as the foundation of its democratic institutions.[9]

Extending antitrust immunity to petitioner would not serve these goals. The integrators do not raise chickens; they contract with others to do so.[10]

The independent growers with whom the integrators contract invest in land, buildings, equipment, and labor to raise chickens (R. 393-394). This investment may exceed an integrator's aggregate investment in breeder flocks, hatcheries, and processing facilities (R. 393).

Moreover, independent growers assume, in addition to their contribution of labor and capital, a substantial portion of the business risks involved in raising broilers. Some contracts with integrators provide (R. 398-399): (1) that the grower pay taxes on the chickens and the cost of feed, grit, litter, fuel and sanitation products; (2) that

[8]Petitioner's assertion (Pet. 16) that Capper-Volstead supporters eschewed any special concern for the individual farmer is erroneous. The debates are replete with references to the desirability of preserving the family farm and of limiting Capper-Volstead protection to the man who tills the soil. See, *e.g.*, 59 Cong. Rec. 7855-7856 (1920) (remarks of Congressman Evans); 62 Cong. Rec. 2048, 2050-2051 (1922) (remarks of Senator Kellogg).

[9]62 Cong. Rec. 2058 (1922) (remarks of Senator Capper); *id.* at 2050-2051 (remarks of Senator Kellogg).

[10]Petitioner's claim of antitrust immunity fails if any member is not a "farmer." *Case-Swayne Co.* v. *Sunkist Growers, Inc., supra.* Petitioner's assertion (Pet. 17) that all of its members are engaged in more than the processing of broilers is erroneous; two of its 32 members neither own nor operate farms and "do not own or control any breeder flocks, hatcheries or feed mills, either" (R. 392).

the grower absorb chick losses in excess of five percent; (3) that the grower pay damages for lost profits due to chick casualties caused by grower negligence; or (4) that feed losses be split between the member and grower if chicks die in the event of fire or natural disaster. Several contracts tie the grower's payment to the market price of broilers and the integrator's costs of supplying feed or services (R. 395-396). The independent growers thus bear a substantial part of the risks traditionally associated with farming.

2. Petitioner dwells upon its members' financial interest in the chicks. But this Court has rejected the view that persons with a financial stake in agricultural production automatically qualify as "farmers." *Case-Swayne Co.* v. *Sunkist Growers, Inc., supra*, 389 U.S. at 394. The integrators, unlike the growers, do not bear the risks of investment in land and buildings that are unique to farming. The integrator's risk is limited to the cost of each group of chicks and to the necessary feed, medicines and veterinary services (Pet. 4) during one growing cycle of seven to nine weeks.[11] An integrator may decline to renew a grower's contract after each cycle (R. 397-398), leaving the grower with an investment that cannot readily be shifted to other endeavors.

3. Petitioner's inventive interpretation of the Capper-Volstead Act is inconsistent with the well-established principle that antitrust exemptions, including that created by that Act, should be narrowly construed. *Case-Swayne,*

[11]Petitioner's attempt (Pet. 14-15) to analogize integrators to farm owners who use tenant farmers to produce crops is flawed in at least two respects. First, the owner's investment in farm land is fixed in a way similar to the growers rather than to the integrators. Second, the farm owner, unlike the integrator, assists in the preservation of traditional farm life.

Co. v. *Sunkist Growers, Inc., supra,* 389 U.S. at 393; *Maryland and Virginia Milk Producers Association, Inc.* v. *United States,* 362 U.S. 458, 466-467; *United States* v. *Borden Co.*, 308 U.S. 188, 198, 204-206. As the court of appeals noted (Pet. App. A-22), arguments that the list of persons eligible for the antitrust exemption should be extended must be directed to Congress rather than the courts.[12]

4. Petitioner contends (Pet. 17-18) that the court of appeals failed to give controlling weight to the views of the Department of Agriculture and the Farm Credit Administration concerning the status of integrators. But neither agency has ever expressed an opinion on the antitrust issue in this case or claimed any authority to do so.[13] Nothing in either the language or the legislative history of the Capper-Volstead Act suggests that these agencies are empowered to determine who is eligible for the antitrust exemption. The agencies lack antitrust expertise, and there was no reason for the court of appeals to give their interpretation of statutes and regulations unrelated to the antitrust laws any antitrust significance.[14] See *Otter Tail*

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[12]The Agricultural Fair Practices Act of 1967, 82 Stat. 93, 7 U.S.C. 2301 *et seq.*, and its legislative history support our argument that integrators are not "farmers." See Hearings on S. 109 (Agricultural Producers Marketing Act) before a Subcommittee of the Senate Committee on Agriculture and Forestry, 90th Cong., 1st Sess. 12, 90-91, 95-96 (1967); S. Rep. No. 90-474, 90th Cong., 1st Sess. 2-3, 5-6 (1967).

[13]Section 2 of the Capper-Volstead Act, authorizing the Secretary of Agriculture to prevent cooperative associations from unduly enhancing prices, was not intended to displace, postpone or prevent prosecutions under Section 1 of the Sherman Act. *United States* v. *Borden Co.*, 308 U.S. 188, 206. The Secretary has never issued a complaint in the exercise of his Section 2 responsibilities.

[14]Although the Department of Agriculture has urged the formation of agricultural cooperatives, the practices and publications cited by petitioner (Pet. 17-18; Pet. App. A-38 to A-46) do not suggest that integrators are "farmers" or that cooperatives have antitrust immunity.

Power Co. v. *United States*, 410 U.S. 366, 372-374; *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U.S. 349, 353.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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